State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Sanborn Regional School District Complainant v. Sanborn Regional Education Association/NEA-NH Respondent	*	Case No: T-0256-23 Decision No. 2005-151

APPEARANCES

Representing Sanborn Regional School District:

Abigail J. Sykas, Esquire
Soule, Leslie, Kidder, Sayward & Loughman

Representing Sanborn Regional Education Association/NEA-NH:

James F. Allmendinger, Esquire
NEA-New Hampshire

BACKGROUND

The Sanborn Regional School District ("the District") filed an unfair labor practice complaint on July 22, 2005 alleging that the Sanborn Regional Education Association/NEA-New Hampshire ("the Association") committed an unfair labor practice in violation of RSA 273-A:5 II (d), (f) and (g) by demanding arbitration of a grievance resulting from the non-renewal of second year teacher Lee Wilson. The Association filed its answer denying the District's complaint on August 8, 2005. A pre-hearing conference was held on September 15, 2005 at the offices of the Public Employee Labor Relations Board ("PELRB" or "Board"), Concord, New Hampshire. Upon discussion between the parties' counsel and the hearing officer during the pre-hearing conference, the parties stipulated to presenting the instant matter through written submissions.

The adjudicative hearing scheduled for September 28, 2005 was cancelled and instead the parties' counsel executed a "Stipulation of Facts" and filed the document with the Board on that

date. Also on September 28, 2005, the Association submitted additional documents identified as "Association Exhibits." A corrected version of the "Stipulation of Facts" was filed on October 7, 2005, as well as the parties' respective memorandums of law. Also on October 7, 2005, the District filed an objection to the Association's exhibits, to which the Association filed a response on October 17, 2005. On October 24, 2005, the District filed a "Reply to the Association's Brief. On November 3, 2005, the Association filed an "Assented-to Motion to File Reply Brief" and "Reply Brief of the Association," wherein the Association indicated, *inter alia*, that the parties "have agreed that neither party will file any additional pleadings prior to the issuance of the Board's decision...". In closing the record as of November 3, 2005, and upon review and consideration of all relevant evidence, including the parties' joint factual stipulations incorporated as Findings of Fact paragraphs 1 through 22,[1] below, the hearing officer determines the following:

FINDINGS OF FACT

1. The Sanborn Regional Educational Association is the duly elected exclusive representative of the bargaining unit which included Lee Wilson, a public Employee as defined in RSA 273-A: 1, IX.

2. The Sanborn Regional School District is a public employer as defined in RSA 273-A: 1, X.

3. The parties' 2002-2005 Collective Bargaining Agreement was in force on August 29, 2003, and expired on June 30, 2005. *See Jt. Ex. 1.*

4. The parties' 2005-2008 Collective Bargaining Agreement commenced on July 1, 2005. *See Jt. Ex. 2.*

5. Lee Wilson was first employed by the Sanborn Regional School District in the position of Middle School Enrichment Teacher for the 2003-2004 school year. Ms. Wilson was again extended a contract for the 2004-2005 school year. These are the only years Ms. Wilson worked for the Sanborn Regional School District.

6. Ms. Wilson was not a continuing contract teacher as defined in RSA 189:14-a.

7. If the School District had employed Ms. Wilson as a teacher for the 2005-2006 school year, she would have achieved the status of a continuing contract teacher pursuant to RSA 189:14-a, II.

8. Superintendent James Weiss did not nominate Ms. Wilson for a position in the School District for the 2005-2006 school year.

[1] The parties also stipulated in Paragraph 23, therein, that they "...may submit exhibits separately from this stipulation, subject to objection by the other party."

9. The Sanborn Regional School Board did not elect Ms. Wilson for a position in the School District for the 2005-2006 school year.

10. Via letter from Superintendent Weiss dated April 8, 2005, Ms. Wilson was informed that in accordance with RSA 189:14-a, she was not re-nominated for a position in the School District for the 2005-2006 school year. *See Jt. Ex. 3.*

11. On or about April 14, 2005, Ms. Wilson filed a grievance resulting from her non-renewal. As the remedy for her grievance, Ms. Wilson sought a professional teaching contract in SAU 17. *See Jt. Ex. 4.*

12. On April 19, 2005, Kathleen Laureti, the principal of the Middle School, denied Ms. Wilson's grievance. *See Jt. Ex. 4.*

13. On or about April 19, 2005, Ms. Wilson appealed the initial denial of the grievance to the Superintendent of the School District. *See Jt. Ex. 5.*

14. The parties agreed to an additional two weeks for the Superintendent to respond to Ms. Wilson's grievance.

15. Via letter dated May 19, 2005, Superintendent Weiss denied the appeal. *See Jt. Ex. 6.*

16. Via letter dated May 26, 2005, Ms. Wilson appealed the Superintendent's decision to the School Board. *See Jt. Ex. 7.*

17. By letter dated June 27, 2005, the School Board denied Ms. Wilson's appeal. *See Jt. Ex. 8.*

18. Via letter dated June 27, 2005 from Greg Andruschkevich, the Association notified the School District of its request for arbitration of Ms. Wilson's grievance. *See Jt. Ex. 9.* The parties did not agree to an arbitrator. *See Jt. Ex. 10.*

19. Via letter dated July 8, 2005 from the Association's attorney Jim Allmendinger, the Association applied for arbitration of Ms. Wilson's grievance. *See Jt. Ex. 11.*

20. On or about July 8, 2005, the School District, through it's attorney Michael S. Elwell, asked the Association to cease and desist from attempting to arbitrate Ms. Wilson's non-renewal. However, the Association, through its attorney, has failed and refused to do so.

21. The parties had no agreement regarding the treatment of any grievances pending when the 2002-2005 Collective Bargaining Agreement expired.

22. RSA 273-A:4 and RSA 189:14-b were amended by Senate Bill 76 (2003), and those amendments were effective August 29, 2003. *See Jt. Ex. 12.*

23. Article 4 of the CBA provides that the District "retains and reserves unto itself all powers, rights, authority and duties, and responsibilities conferred upon and vested in it by the laws and Constitution of the State of New Hampshire and of the United States except as modified by the specific terms and provisions of this Agreement." *See Jt. Ex. 1, p. 3.*

24. Article 5 of the CBA, entitled "Teacher Rights," includes the provisions that "[t]he personal life of any teacher is not appropriate official business of the [District] unless it affects classroom performance and/or effectiveness [in 5.3]" and "[a]ll [District] policy governing teachers...shall be applied uniformly throughout the district [in 5.5]" *See Jt. Ex. 1, p. 3.*

25. Under Articles 6.1 and 6.3, respectively, the parties agreed that "[a]ll monitoring or observation of the work performance of a teacher will be conducted openly and without attempt to avoid knowledge of the teacher" and "[n]o member of the Bargaining Unit shall be disciplined except for just cause..." *See Jt. Ex. 1, p. 4.*

26. The parties' contractual grievance procedure, as set forth in Article 7, defines a grievance as "a claim made by a teacher based upon an alleged violation of a specific provision of this agreement."

27. Ms. Wilson's grievance dated April 14, 2005 alleges violations of Articles 5.3, 5.5, 6.1 and 6.3 of the CBA. *See Jt. Ex. 4.*

28. The parties' contractual grievance procedure, as set forth in Article 7 of the 2002-2005 CBA, includes the provision that "the arbitrator shall proceed forthwith to make a final and binding disposition of the grievance by such means and methods as he/she may determine to be necessary." *See Jt. Ex. 1, p. 7.*

29. There is no agreement between the parties, either in the contractual grievance procedure or other written agreement, that arbitrability disputes shall be referred to an arbitrator for resolution.

DECISION

JURISDICTION

Unless otherwise agreed by the parties to submit such questions to an arbitrator, it is well-settled that the PELRB has exclusive original jurisdiction to determine arbitrability issues. *School District #42 v. Murray*, 128 N.H. 417 (1986). Here, in view of the fact that the parties have not reserved arbitrability disputes to be decided by an arbitrator, it is appropriate for the Board to decide the matter. It is also well-settled that a wrongful demand for arbitration constitutes an unfair labor practice. *Keene School District v. Keene Education Association/NEA-New Hampshire*, PELRB Decision No. 2003-146 (December 3, 2003), *aff'd mem.*, Case No. 2004-0108 (N.H. April 14, 2004). The PELRB has primary jurisdiction of all alleged violations

of RSA 273-A:5 (see RSA 273-A:6, I) and where, as here, the District has alleged violations of RSA 273-A:5 II (d), (f) and (g) by the Association, Board jurisdiction is additionally appropriate.

DISCUSSION

At the outset, I address the District's objection to the Association's exhibits. In its objection dated October 7, 2005, the District states that each of the Association's exhibits "is irrelevant to the issue of arbitrability and instead impermissibly addresses the merits of the case." In its response, dated October 17, 2005, the Association maintains that the documents are "relevant, material and otherwise admissible."

The administrative rules of the Board provide, *inter alia*, that "[t]he formal rules of evidence shall not apply in adjudicative proceedings. Any...documentary evidence shall be received except that the board or the presiding officer shall rule on and exclude irrelevant, immaterial or unduly repetitious evidence." N.H. CODE ADMIN. R. PUB. 203.02 (e). But for Association Exhibit 9, the Association's exhibits generally relate to background information of Ms. Wilson's employment and her April 14, 2005 grievance. I do not believe that these documents can be accurately described as "irrelevant, immaterial or unduly repetitious evidence" and therefore admit them into the record. Their admission, however, should not be construed as an intent to address the merits of the underlying grievance but merely to assist the hearing officer in determining whether the instant dispute presents a "colorable issue of contract interpretation." *Appeal of Westmoreland School Board*, 132 N. H. 103, 109 (1989). However, as to Association Exhibit 9, specifically a grievance filed by Ms. Wilson on May 4, 2005 regarding the alleged failure of a District official to write a generic letter of recommendation for her, I find that this document is not relevant to the matter at hand and therefore exclude it from the record.

The relevant facts on which to determine whether Ms. Wilson's grievance should be referred to arbitration are otherwise undisputed. Ms. Wilson was a non-tenured teacher who received a notice of non-renewal from the District on April 8, 2005. She filed a grievance on April 14, 2005 under the parties' contractual grievance procedure alleging a violation by the District of Articles 5.3, 5.5, 6.1 and 6.3 of the parties' CBA. The grievance was processed through the grievance procedure and has now reached the final step of arbitration, with the Association formally requesting on June 27, 2005 to arbitrate Ms. Wilson's grievance. (*Finding of Fact No. 18, Jt. Ex. 9*). The District's complaint requests that the Board determine that the grievance of Ms. Wilson is not arbitrable because (1) RSA 273-A:4 and RSA 189:14-b prohibit arbitration of grievances that result from teacher non-renewals, and (2) employment of a teacher and the granting of continuing contract status to a teacher are prohibited subjects of bargaining.

In reference to the first issue raised by the District, RSA 273-A:4 and RSA 189:14-b were amended by Senate Bill 76 (2003), and those amendments were effective August 29, 2003. (*Finding of Fact No. 22, Jt. Ex. 12*). RSA 273-A;4, as amended, provides:

> Every agreement negotiated under the terms of this chapter shall be reduced to writing and shall contain workable grievance procedures. No grievance resulting from the failure of a teacher to be renewed pursuant to RSA 189:14-a shall be subject to arbitration or any other binding resolution, except as provided by RSA 189:14-a and RSA 189:14-b. Any

such provision in force as of the effective date of this section shall be null and void upon the expiration date of that collective bargaining agreement.

RSA 273-A:4 (Supp. 2004). RSA 189:14-b, I, as amended, states: "[a] request for review under this section shall constitute the exclusive remedy available to a teacher on the issue of the non-renewal of such teacher." RSA 189:14-b, I (Supp. 2004). Based upon these amendments, Ms. Wilson's grievance could not be the subject of arbitration under the parties current CBA because (1) the grievance resulted from her nonrenewal and (2) the parties' current CBA became effective on July 1, 2005 and after the effective date of the new amendments, namely August 29, 2003. However, Ms. Wilson's grievance was filed on April 14, 2004, when the parties' prior CBA was still in effect. The instant scenario therefore presents the question of which CBA governs the rights of the parties in respect to Ms. Wilson's grievance, and if the 2002-2005 agreement applies, does her grievance survive the expiration of that CBA?

I conclude that the procedural rights for Ms. Wilson's grievance are governed by the terms of 2002-2005 CBA and that the amendments to RSA 273-A:4 and RSA 189:14-b are not applicable to the dispute. In the case of *Appeal of Police Commission of City of Rochester*, 149 N.H. 528 (2003), the Court affirmed a Board decision that addressed which procedural rights as contained in separate, but successive, CBA's shall govern a particular dispute. The Board determined that it is the date of the triggering event resulting in the grievance that determines which CBA applies. *Id.* at 532. The Court quoted the Board's rationale that said event "becomes the date from which the aggrieved knows about the type of and ramifications from the...[action]...which has been imposed and from which the aggrieved has a given number of days in which to file an objection or appeal...This is the date from which rights flow or expire." *Id.* at 532. In applying this precedent to the case at hand, the event of Ms. Wilson's nonrenewal occurred on April 8, 2005, or during the term of the 2002-2005 CBA, and therefore it is the 2002-2005 CBA under which her rights shall be determined.

The question remains, however, of whether the amendments to RSA 273-A:4 and RSA 189:14-b render the Association's request to arbitrate Ms. Wilson's grievance "null and void" as of the expiration of the 2002-2005 CBA on June 30, 2005. I find that they do not. In conformity with the Court's decision in *Appeal of Police Commission of City of Rochester*, the grievance should be allowed to run its course under the terms of the 2002-2005 CBA's grievance procedure. In *Appeal of Police Commission of City of Rochester*, the Court sustained a similar circumstance in which a Union sought to further pursue a grievance in arbitration under the provisions of an expired contract. *Id.* Since Ms. Wilson's grievance was filed in response to her non-renewal of April 8, 2005, and before the expiration of the 2002-2005 CBA, it survives under the grievance procedures in effect on that date.

The District's interpretation and application of the statutory amendments would have unduly harsh and nonsensical results, in that it would terminate Ms. Wilson's grievance "mid-stream," after she had filed a grievance but before the grievance steps were completed. It is well-settled that when interpreting a statute, the Court looks to "the plain and ordinary meaning of the statutory language to determine legislative intent, [and]...will not read words or phrases in isolation; [but] in the context of the entire statute." *Kenison, et al v. Dubois*, et al, __ N.H. __, 879 A.2d 1161, 1165 (2005) (citation omitted). In this regard, it is worth noting that RSA 273-

A:4 still provides, in pertinent part, that "[e]very agreement negotiated under the terms of this chapter...shall contain *workable* grievance procedures..." (emphasis added). If Ms. Wilson's grievance is deemed to have expired on June 30, 2005 along with the 2002-2005 CBA, it would render the parties' grievance procedure, and in particular her grievance, *unworkable* and thereby inconsistent with "the entire statute." Where the statute is otherwise silent as to the status of any such pending grievance upon the expiration of a CBA, it would be inappropriate to apply the "null and void" language to grievances and in that way deprive the Association and Ms. Wilson of previously vested arbitration rights.[2]

Having determined that Ms. Wilson's grievance survives the expiration of the 2002-2005 CBA and the amendments to RSA 273-A:4 and RSA 189:14-b, I now address the District's contention that the grievance is not arbitrable because employment of a teacher and the granting of continuing contract status to a teacher are prohibited subjects of bargaining. When faced with a dispute concerning the arbitrability of a grievance, the Board traditionally applies the analysis set forth in the case of *Appeal of Westmoreland School Board*, 132 N.H. 103 (1989), which also involved the nonrenewal of a teacher who had taught for two years in a school district. See also *Appeal of the City of Nashua, School District #42*, 132 N.H. 699 (1990). In *Westmoreland*, the Court adopted the principles earlier described by the United States Supreme Court in the case of *AT&T Technologies v. Communications Workers*, 475 U.S. 643 (1986) for deciding whether a dispute is arbitrable, including the "positive assurance" standard. *Appeal of Westmoreland School Board*, 132 N.H. 103, 105, 106 (1989). "Under the positive assurance standard, when a CBA contains an arbitration clause, a presumption of arbitrability exists, and '[i]n the absence of any express provision excluding a particular grievance from arbitration,...only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail.'" *Id.* at 105-106.

Here, the parties' CBA contains a final and binding arbitration clause, and thus a presumption of arbitrability exists. (*Finding of Fact No. 28*). Under Article 4 of the CBA, the District "retains and reserves unto itself all powers, rights, authority and duties, and responsibilities conferred upon and vested in it by the laws and Constitution of the State of New Hampshire and of the United States *except as modified by the specific terms and provisions of this Agreement.*" (*Finding of Fact No. 23*)(emphasis added). Ms. Wilson, a non-continuing contract teacher and member of the bargaining unit represented by the Association (see *Finding of Fact Nos. 1 & 6*), filed a grievance alleging violation of specific terms and provisions of the parties' agreement. (*Finding of Fact No. 27*). The parties' contractual grievance procedure, as set forth in Article 7, defines a grievance as "a claim made by a teacher based upon an alleged violation of a specific provision of this agreement." (*Finding of Fact No. 26*). While the grievance clearly resulted from her notice of nonrenewal, she still has standing as a teacher and member of the bargaining unit to pursue her claims.

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[2] By way of further observation, the grievance procedure is a "creature" of the parties that is appropriately exercised through their joint participation. Sometimes it takes longer to complete than others, and I note that a two week extension was agreed to by the parties in this case for the Superintendent to respond to Ms. Wilson's grievance. (*Finding of Fact No. 14*). To deem the instant grievance non-arbitrable simply because it was not fully adjudicated under the parties' grievance procedure by a particular date, or specifically by June 30, 2005, would ignore the occasional vagaries of the grievance process and arbitrarily penalize Ms. Wilson for circumstances beyond her control.

As the grievance reflects, Ms. Wilson contends that the District's action violates Article 5, "Teacher Rights," in that her personal life has inappropriately been a factor of consideration for the District and that the District, in applying it's polices, has subjected her to disparate treatment. Moreover, under Article 6, "Academic Freedom and Responsibilities," she asserts that the District did not monitor or observe her work in accordance therewith and that she has been disciplined without just cause. Whether or not these claims are meritorious has yet to be determined, but I cannot find with positive assurance that they are excluded from arbitration.[3] As distinguished from the facts in *Westmoreland*, there is no express language within the agreement, or other forceful evidence, that would indicate a purpose to exclude her claim(s) from arbitration. On the contrary, similar to the Court's holding in *Appeal of the City of Nashua, School District #42*, 132 N.H. 699 (1990), the matter involves the interpretation and application of specific terms and provisions of the parties' agreement. Accordingly, without addressing the merits of Ms. Wilson's grievance, I find that the CBA is susceptible of a reading that covers the instant dispute. The District's unfair labor practice is hereby dismissed and the parties are directed to proceed to arbitration forthwith.

So ordered.

Signed this 2nd day of December, 2005.

Peter C. Phillips, Esq.
Hearing Officer

Distribution:
James F. Allmendinger, Esq.
Michael S. Elwell, Esq.

[3] I note that in its' memorandum of law, the District asserts that portions of the grievance are untimely filed under the parties' grievance procedure. (See District's Memorandum of Law, pp. 5-6). I find there to be insufficient evidence to reach such a conclusion, and, on the contrary, conclude that the grievance was filed in a timely manner, that being 6 days after her receipt of the letter of nonrenewal and within the 15 day contractual time period for filing a grievance.